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No. 04-626

IN THE

Supreme Court of the United States

GLENDALE FEDERAL BANK, FSB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF OF PETITIONERS	1
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Citizens Fed. Bank v. *United States*, 52 Fed. Cl. 561 (2002) 4
Granite Mgmt. Corp., v. *United States*, 58 Fed. Cl. 766 (2003) 7
Landmark Land Co. v. *FDIC*, 256 F.3d 1365 (Fed. Cir. 2001) 4
LaSalle Talman Bank v. *United States*, 317 F.3d 1363 (Fed. Cir. 2003) 4
Mobil Oil Exploration & Prod. S.E., Inc. v. *United States*, 530 U.S. 604 (2000) 1, 2
RTC v. *FSLIC*, 34 F.3d 982 (10th Cir. 1994) 9
Standard Fed. Bank v. *United States*, 62 Fed. Cl. 265 (2004) 7
United States v. *Bethlehem Steel Corp.*, 315 U.S. 289 (1942) 6
Westfed Holdings, Inc. v. *United States*, 52 Fed. Cl. 135 (2002) 4

OTHER AUTHORITIES

26 R. Lord, *Williston on Contracts* (4th ed. 2004) 2
Restatement (Second) of Contracts (1981) 6

REPLY BRIEF OF PETITIONER

The government appears to agree that this case would warrant the Court's attention if the Federal Circuit had actually adopted the erroneous rules of law identified in Glendale's petition. The government insists, however, that the Federal Circuit accepted *Glendale*'s legal standards for restitution, and simply found the facts here insufficient to meet them. This characterization of what happened in the Federal Circuit is flatly wrong. In fact, although the government seeks to disguise its handiwork, the *government* convinced the Federal Circuit to adopt erroneous legal rules, including a rule that contravenes this Court's decision in *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604 (2000).

The government cannot minimize the importance and impact of the legal errors in the Federal Circuit's decision by saying that *Winstar* litigation is at a "late stage." US Opp. at 10. Even the government acknowledges that approximately *45 Winstar* cases remain pending. *Id.* at 2. Thus, there are at least 45 further opportunities for the harmful application of the erroneous rules of law adopted in this model case, which the Federal Circuit has given special "precedential value." 04-626 Pet. App. 23a. Moreover, because the Federal Circuit adopted pro-government rules disfavoring restitution for any breach of contract by the government in the court of appeals that handles nearly all such claims, the legal rules at issue will affect numerous other government contract cases.

1. As Glendale previously demonstrated, the Federal Circuit has adopted the erroneous rule of law that restitution cannot exceed plaintiff's "actual losses." 04-626 Pet. App. 37a; see Glendale Pet. at 12-15. It rejected the trial court's award of restitution – which was properly based on a factual finding of the amount of the government's benefit – on the ground that it "ignore[d] the reality of subsequent events as

they impacted on the parties, and *particularly the plaintiff*." 04-626 Pet. App. 37a (emphasis added); see also *id.* ("Reliance damages will permit a more finely tuned calculation of the *actual losses* sustained by plaintiff as a result of the Government's breach." (emphasis added)).

The Federal Circuit's limitation of restitution conflicts with this Court's holding in *Mobil* that restitution must be based on the defendant's benefit and is available even if a plaintiff suffered "*no* damage." 530 U.S. at 623 (emphasis added).[1] The circuit court's rule of restitution also conflicts with the black-letter law that when the defendant commits a material breach and "the benefit to the defendant of what has been furnished exceeds the cost or value to the plaintiff, there is no reason why recovery of this excess should not be allowed." 26 R. Lord, *Williston on Contracts* § 68:36 (4th ed. 2004); see also Glendale Pet. at 13-14 (citing additional authorities).

Rather than defend the Federal Circuit's indefensible holding – which adopted wholesale the position the government took below[2] – the government tries to change it.

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[1] In a footnote, the government suggests that Glendale "waived" the government's breach because Glendale "continued to perform after FIRREA." US Opp. at 20 n.5. The government never even raised this argument below. In any event, as the trial court found, Glendale's performance was complete when it assumed Florida's liabilities in 1981. *See* J.A., *Glendale Fed. Bank, FSB* v. *United States*, No. 99-5103, -5113 (Fed. Cir. filed Dec. 13, 1999) ("99-5103 C.A. App."), at A1009968 ("When Glendale purchased Broward, it completed its part of the deal."), A1009979-80 (trial court finding), A2001060 (contract provision).

[2] The government argued to the Federal Circuit that:

> the plaintiff's cost of performance is the proper measure of an award of restitution, since it is the best means of restoring the status quo ante. . . . Accordingly, in calculating restitution, a court does not determine the value of performance to the breaching party, but rather the cost of performance to the non-breaching party, offset by the benefits by that party. . . .
>
> Rather than determine the amount of Glendale's costs incurred in performing the contract, the trial court focused solely on the

Specifically, according to the government, "[t]he court of appeals rejected Glendale's theory not because a restitution award would exceed Glendale's 'actual losses,' but because Glendale's attempt to prove a benefit received by the government was 'flawed,' 'speculative,' and 'indeterminate.'" US Opp. at 17 (quoting 04-626 Pet. App. 34a, 35a).

It is clear, however, that in making these statements, the Federal Circuit was *not* reviewing the trial court's finding that Glendale had proven the value of the benefit it conferred on the government, but was instead offering a broad critique of the restitution remedy as a matter of law precisely because it would result in an award exceeding plaintiff's costs.[3] The Federal Circuit made this even more explicit in its second *Glendale* decision. It stated, as a matter of law, that restitution of "the supposed gains received by the breaching party" was unavailable "in the context of *these cases*," *i.e.*, not just in *Glendale*, because the "*theory*" was overly "speculative and indeterminate, and thus "[r]estitution as a

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> purported benefit received by the Government as a result of the contract, holding that "[r]estitution . . . would assign any benefits conferred on defendant at the time the contract was formed to plaintiff." The court therefore awarded Glendale the present value of the cost of paying off Broward's excess liabilities at the time of the contract, determining that the Government "saved" that amount by not having to liquidate Broward. . . . This is not a legitimate purpose of restitution as a contract remedy.
>
> The trial court's critical error was its failure to measure any restitutionary award not upon the basis of "benefits" purportedly received by the Government, but upon the basis of the costs to Glendale of conferring those benefits.

Brief of Defendant-Appellant the United States at 31-33, *Glendale Fed. Bank, FSB* v. *United States*, Nos. 99-5103, -5113 (Fed. Cir. filed Aug. 9, 1999) (some internal quotation marks and citations, footnote omitted).

[3] If the government's characterization of the Federal Circuit's decision were correct, that court would have (i) stated that it was reviewing the trial court's benefit finding for clear error and then (ii) explained how the specific factual findings were clearly erroneous. No such discussion appears in the Federal Circuit's decision.

generalized theory for recovery of assumed benefits to the Government, based on *non-provable* paper *costs*, has been rejected." 04-626 Pet. App. 3a, 8a (emphases added).

Other Federal Circuit decisions confirm that this is its view. For example, in *Landmark Land Co.* v. *FDIC*, the court cited *Glendale* for the proposition that the purpose of restitution is to "'restore[] to the non-breaching party the *net loss that he suffered* as a result of his performance under the contract.'" 256 F.3d 1365, 1372 (Fed. Cir. 2001) (emphasis added) (citing *Glendale*, 239 F.3d at 1380). Two years later, the court again said that "[t]he principle of restitution damages is to return the *costs* incurred in performing the contract" and followed the "resolution" in *Glendale* that "net liabilities . . . do[] not create a '*cost*' subject to restitution for full cash value." *LaSalle Talman Bank, FSB* v. *United States*, 317 F.3d 1363, 1376-77 (Fed. Cir. 2003) (emphases added).[4]

Moreover, contrary to the position taken in its Opposition, the government has cited *Glendale* to the trial courts in support of the contention that, "as a matter of law," restitution may *not* be based on the benefit conferred on the plaintiff. See, *e.g.*, *Citizens Fed. Bank* v. *United States*, 52 Fed. Cl. 561, 565 (2002) ("[The United States] argues that *Glendale* applies to preclude Plaintiffs from restitutionary damages *as a matter of law* under a 'benefits conferred' approach." (emphasis added)). The trial courts have read *Glendale* the same way. See, *e.g.*, *Westfed Holdings, Inc.* v. *United States*, 52 Fed. Cl. 135, 164 (2002) ("The court's reading of *Glendale* is that the Federal Circuit disfavors restitution measured by the benefit conferred on the breaching party in the *Winstar* context.").

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[4] These decisions confirm that although *Glendale* grudgingly acknowledged that "[r]estitution is *sometimes described* in terms of taking from the breaching party any benefits he received from the contract and returning them to the non-breaching party," 04-626 Pet. App. at 32a (emphasis added), it subsequently *rejected* that view because it failed to measure plaintiff's "actual losses," *id.* at 37a.

2. The government's attempted recharacterization of the Federal Circuit's holding is further refuted by that court's refusal to order return to Glendale of more than $18 million Glendale paid *in cash* to the government in performance of its obligations under the contract the government later breached. The government cannot and does not contend that this cash payment was "speculative and indeterminate." The only possible ground the Federal Circuit could have had to deny Glendale restitution of this money was its rule that restitution in excess of plaintiff's "actual losses" is unavailable. See Glendale Pet. at 15-16.

Before the Federal Circuit, the government did not specifically address this portion of Glendale's restitution award, instead rolling it into its overall challenge to any benefit-based restitution. Now that the government is attempting to distance itself from that view of restitution (after having convinced the Federal Circuit to adopt it), the government offers two reasons why restitution of the $18 million was unwarranted. Neither reason (both of which are wrong in any event) can explain why the Federal Circuit rejected the $18 million portion of the restitution award.

First, the government contends that "because the interest rate protection provision of the contract" under which Glendale paid the $18 million "was fully performed by each party, restitution is not available." US Opp. at 21. What the government fails to mention is that this exact severability argument was *rejected* on its factual merits by the trial court, *and the government did not appeal that ruling.* As the trial court explained,

> [p]laintiff also seeks restitution in the amount of $18.24 million that Glendale paid to the government under the interest rate shifting provision of the contract. *The government argues that this portion of the contract is discrete and fully performed by both parties so that recovery is unwarranted.* Plaintiffs put forward persuasive evidence that this provision was negotiated as part of the

> overall agreement, and that the terms of the overall contract would have been altered, had the government not agreed to grant a 40-year amortization period. As the affidavit of David Hansen indicates, had Glendale not received the benefit of the 40-year amortization protection it would have demanded other modifications, including greater interest rate protection and other government assistance. *It is impossible to treat the provision as autonomous*, and plaintiff is entitled to the return of these payments, the amounts of which are not challenged by the government, as restitution of a benefit conferred on the government.

04-626 Pet. App. 71a-72a (emphases added); see also *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289, 298 (1942) (contract is "entire" and not severable when "'the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out'"); *Restatement (Second) of Contracts* § 373 cmt. c (1981) (portion of contract must be "divisible" from rest in order for restitution to be denied based on defendant's performance of one portion of contract). The government did not even appeal the factual finding that "the interest rate shifting provision" was not "autonomous."

Second, the government contends that the $18 million "would be more than offset by the $243 million in benefits that Glendale itself received from the contract." US Opp. at 21 n.6 (citing US Cross-Pet. at 25-29). This "offset" argument has been rejected factually by both the trial court and the Federal Circuit for the reasons Glendale has already provided the Court. See Glendale Opp. at 24-27 (government failed to show that Glendale received a *net* benefit from its Florida franchise). Given that the Federal Circuit explicitly rejected this argument, it could not have denied restitution of the $18 million on this basis. Accordingly, the *only* possible rationale for the Federal Circuit's denial of this restitution

was its adoption of the incorrect legal rule that restitution in excess of plaintiff's losses is unavailable.

So obvious is the Federal Circuit's error in refusing to award restitution of Glendale's $18.24 million cash payment, and so unavailing are the government's arguments, that summary reversal on this portion is warranted.

3. Even assuming, *arguendo*, that the Federal Circuit permits restitution based on the government's benefit, it nonetheless applied a special pro-government rule by reviewing the trial court's restitution award *de novo*. Both general contract principles and the rules applied in two other circuits require review only for abuse of discretion. See Glendale Pet. at 16-19, 20-21.

In response, the government contends that the Federal Circuit "merely concluded" that restitution was unavailable on "the facts of this case." US Opp. at 18. But the Federal Circuit itself categorically held that its *de novo* review meant that "[r]estitution as a *generalized* theory for recovery of assumed benefits to the Government, based on non-provable paper costs, has been rejected[.]" 04-626 Pet. App. at 8a (emphasis added).

The trial courts have likewise interpreted *Glendale* as a legal ruling barring restitution based on assumption of liabilities in all cases. See, *e.g.*, *Standard Fed. Bank* v. *United States*, 62 Fed. Cl. 265, 295 (2004) ("Measuring damages through the assumption of net liabilities has been rejected by the Federal Circuit in a restitution context in *Glendale* and *LaSalle Talman*."). And (except in this Court) the government has enthusiastically advanced that interpretation of *Glendale*. See, *e.g.*, *Granite Mgmt. Corp.* v. *United States*, 58 Fed. Cl. 766, 772 (2003) ("[The government] maintains that plaintiff's restitution claim is based on net liabilities assumed and, therefore, barred by *Glendale*, *Cal. Fed.*, and *LaSalle Talman*.").

The Federal Circuit's *de novo* review of restitution created a split with both the Ninth and Tenth Circuits, both of which review restitution on an abuse of discretion standard. See Glendale Pet. at 17-19, 20-21. The government's opposition does not even attempt to dispute this split. Indeed, its characterization of the Federal Circuit's decision only serves to highlight that court's *de novo* review. For example, the government quotes the Federal Circuit's comment that "it was 'not at *all* clear that . . . the Government would have been called upon to make up that [Broward] deficit then and there.'" US Opp. at 13 (quoting 04-626 Pet. App. 34a) (emphasis added; ellipsis in original). The proper inquiry, however, was whether the trial court clearly erred in its findings that the government's only choices were to liquidate Florida or operate it, and operating it would have been *more* expensive than liquidation. See 04-626 Pet. App. at 69a. Indeed, the government goes on to acknowledge that "*some evidence* indicated that the government had no alternative to the merger and that, in the absence of the merger, the government would have paid Broward's net liabilities." US Opp. at 15 (emphasis added). It then points to other evidence in the "record" that it says is to the contrary. *Id.* at 15-16. But this other evidence would have been immaterial except for the Federal Circuit's erroneous use of *de novo* review.[5]

Similarly, the government states that "there was a substantial basis for the conclusion that continued high rates would jeopardize Glendale with or without the acquisition of Broward," US Opp. at 16, and the government "remained contingently liable, as insurer of Glendale's deposits, for all of Broward's net liabilities." *Id.* at 14. Again, this factual contention is flatly contradicted by the trial court's finding

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[5] Thus, the government misses the point when it argues that "further review would not be warranted to consider whether *the court of appeals correctly* apprehended the record evidence in this particular case." US Opp. at 15-16. It was *the trial court*'s job to "apprehend[] the record evidence," with the Federal Circuit limited to review for clear error.

that "[t]he evidence is unambiguous that the government considered [Glendale's acquisition of Florida] to be a permanent solution." 04-626 Pet. App. at 70a n.9. As the trial court found, Glendale "had managed the sustained high interest rates much more successfully than Broward, and . . . was poised to survive." *Id.* at 68a.[6]

4. The Federal Circuit committed another violation of black-letter contract principles when it concluded that, as a matter of law, whether the government is benefited is not measured at the time the contract was entered, but instead must take account of subsequent events. This also creates a conflict because the Tenth Circuit has properly rejected this very approach, calling it "Monday morning quarterbacking." *RTC* v. *FSLIC*, 34 F.3d 982, 984 (10th Cir. 1994); see Glendale Pet. at 19-20, 21.

The government's response to Glendale's showing of error is again to conjure a transformation of the Federal Circuit's holding. According to the government, the Federal Circuit adopted "precisely the principle that Glendale supports" and measured the government's benefit as of the time of the contract. US Opp. at 18. According to the Government, the Federal Circuit looked only at "potential events" and "it did so not because those events subsequently reduced the original value of the benefit that petitioner had conferred on the government, but rather because the possibility that those events would occur showed that petitioner did not confer the benefit it claimed." *Id.* at 19.

Once again, this is not what the Federal Circuit did. Instead, it relied on actual "subsequent events as they *impacted* on . . . the plaintiff," 04-626 Pet. App. at 37a, particularly "that interest rates *did* come down" such that

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[6] Moreover, the government was fully compensated for its "contingent[] liab[ility]" risk, US Opp. at 14, through Glendale's payment of deposit insurance premiums *through a separate contract.* 99-5103 C.A. App. at A1009613, A1009996-97.

restitution "measured . . . a liability that *never* came to pass," *id.* at 35a (emphases added). Indeed, the Federal Circuit's rejection of restitution as a "speculative and indeterminate" theory is justified entirely with references to these *actual* subsequent events. There is not one word in the Federal Circuit's decision that in November 1981, when the contract was entered, anyone anticipated interest rates would come down such that the $798 million benefit was excessive. Nor could there be. The uncontradicted evidence was that in November 1981, long-term interest rates were *higher* than short-term rates, showing that "the market consensus" was that rates were likely to rise. Trial Tr. at 9643-45.[7] Thus, the Federal Circuit misused actual subsequent events – rather than contemporaneous possibilities – to evaluate the government's benefit.

5. Finally, in a back-of-the-brief argument, the government reprises the factual issue of fraud from its conditional cross-petition. See U.S. Opp. at 24. As Glendale has explained, this extraordinarily factbound contention has been rejected by both lower courts as wholly without merit. See Glendale Opp. at 8-15. It provides no basis for denying Glendale's petition.

CONCLUSION

For the foregoing reasons, Glendale's petition for writ of certiorari should be granted.

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[7] In fact, interest rates did initially rise after the contract. 99-5103 C.A. App. at A1021082. Indeed, *before* much of the later fall in interest rates, Glendale had sold most of Broward's fixed-rate assets because the government did not want Glendale to gamble on interest rates declining, as Broward had. *Id.* at A1000326-32, A1014061-62, A2001210, A2001226, A2001351-52.

Respectfully submitted,

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